

IN THE INDUSTRIAL COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 17/2003

In the matter between:

PROMISE MSIBI APPLICANT

And

BENZWANE 1st RESPONDENT

SWAZILAND GOVERNMENT 2nd RESPONDENT

In re;

BEN ZWANE APPLICANT

And

SWAZILAND GOVERNMENT RESPONDENT

CORAM:

NKOSINATHI NKONYANE : ACTING JUDGE DAN MANGO : MEMBER

GILBERT NDZINISA : MEMBER

L. R. MAMBA : FOR APPLICANT

P. R. DUNSEITH : FOR 1st RESPONDENT

L. DLAMINI : FOR 2nd RESPONDENT

RULING- 2 JUNE 2004

This matter was brought before the court on a certificate of urgency on the 25th May 2004. The Applicant is seeking an order as follows:

- a) Condoning the Applicants non-compliance with the rule of the above Honourable Court with regard to the launching of an application and that this application be disposed of on an urgent basis.
- b) Declaring in so far as it is necessary, judgement of the above Honourable Court dated the 4th May 2004 non-implementable pending the realization of the Applicant's appeal which appeal has been noted to the Industrial Court of Appeal.
- c) That the costs of this application be paid by the Respondents jointly and severally one paying the other to be absolved.

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The 2nd Respondent's representative pointed out that the 2nd Respondent was taking a neutral position in the matter. He asked that the court should not make an order for costs against the 2nd Respondent as prayed for by the Applicant.

It was argued on behalf of the Applicant that although the court has discretion in this matter which discretion must be judiciously exercised and the court must be guided by certain considerations one of which is irreparable harm on the Applicant if the stay of execution is not granted. Further, whether the other party, the 1st Respondent in this case, would also suffer irreparable harm if the stay of execution is granted. It was also argued on behalf of the Applicant that the 1st Respondent will not

suffer any prejudice as he is currently employed by the Ministry of Agriculture.

It was further argued that the matter was urgent because the Applicant stands to lose his position as clerk to Parliament. The court was referred, among other cases to the case of Swazi Observer (Pty) Ltd v Hanson Ngwenya & 68 Others -Industrial Court Case No. 188/2000, In that case the court found that the Applicant had established on a preponderance of probability that it was likely to suffer Irreparable harm.

In this matter there was no allegation in the Applicant's papers nor was it pointed out during the arguments that the Applicant was going to lose his

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employment with the Government if the execution was not stayed. It was only argued that the Applicant would lose his position as Clerk to Parliament.

In the Swazi Observer case it was a claim sounding in money. The court found that If the stay was not granted it was likely that the Applicant was not going to recover the money to be paid to the Respondent's should it succeed on appeal. In the present case the claim is for the position of Clerk to Parliament. That position can be regained by the Applicant if it succeeds on appeal, and is joined in the main action and the court rules in its favour.

There was no suggestion made that the Government intends to phase out that position in the near future, and that therefore it might not be there when the Applicant goes to appeal and the appeal would be rendered a nugatory by failure to stay execution.

The prayers in this matter are framed in almost similar lines with the prayers in the Swazi Observer case. Although in prayer (b) there is no express mention of the words "stay of execution", during the arguments and in the Applicant's papers It was clear that the order sought is for a stay of execution pending the hearing of the appeal filed by the Applicant.

For the reasons given above the application is dismissed.

No order as to costs. The members agree.

NKOSINATHI NKONYANE

ACTING JUDGE-INDUSTRIAL COURT

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